492 A.2d 1077
(Cite as: 201 N.J.Super. 181, 492 A.2d 1077)

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Joseph ABBONDANZO, Defendant-Appellant.

Argued April 23, 1985.
Decided May 13, 1985.

***181** SYNOPSIS

Defendant was convicted in the Florham Park Municipal Court of lewdness. At trial de novo before the Superior Court, Law Division, Morris County, defendant was again convicted, and he appealed. The Superior Court, Appellate Division, Simpson, J.A.D., held that: (1) pro se defendant did not make effective waiver of counsel, where trial judge did not advise defendant of defendant's incarceration exposure, and (2) provision of counsel to defendant on appeal of Municipal Court conviction to Superior Court did not cure defendant's ineffective waiver of counsel before Municipal Court, since second trial was de novo on record, which precluded effective assistance of counsel at prior critical stage of proceeding.

Reversed and remanded.

Coleman, J.H., J.A.D., filed concurring opinion.

West Headnotes

[1] Criminal Law k641.4(1)
110k641.4(1)

[1] Criminal Law k641.9
110k641.9

Strong evidence is required to establish knowing and intelligent waiver of right to counsel under U.S.C.A.

Const.Amend. 6 and N.J.S.A. Const. Art. 1, ¶ 10, and presumption exists against such a waiver.

[2] Criminal Law k641.7(1)
110k641.7(1)

Searching and painstaking inquiry must be made by trial judge before he can conclude there has been intelligent and competent waiver of counsel. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, par. 10.

[3] Criminal Law k641.4(2)
110k641.4(2)

Before waiver of counsel is determined and trial proceeds which may result in pro se defendant being jailed following conviction, defendant must understand consequences of waiver.

[4] Criminal Law k641.7(1)
110k641.7(1)

Prior to or at trial of any criminal case where jail sentence may follow conviction, trial judge must advise pro se defendant of incarceration exposure before determining there has been effective waiver of counsel. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, par. 10.

[5] Criminal Law k641.7(1)
110k641.7(1)

Pro se defendant did not make effective waiver of counsel, where trial judge did not advise defendant of defendant's incarceration exposure. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, par. 10.

[6] Criminal Law k1166.10(2)
110k1166.10(2)
(Formerly 110k1166.11(6))

Provision of counsel to defendant on appeal of a municipal court conviction to Superior Court did not cure defendant's ineffective waiver of counsel before municipal court, since second trial was de novo on record, which precluded effective assistance of counsel at prior critical stage of proceeding. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, par. 10.
****1078 *183** Joseph Mezzacca, Jr., Madison, for defendant-appellant (Joseph Mezzacca, Jr., Madison, of

counsel and on the brief; and Richard T. Corbett, Denville, on the brief).

Denise H. Pappas, Asst. Prosecutor, for plaintiff-respondent (Lee S. Trumbull, Morris County Prosecutor; Denise H. Pappas, on the letter brief).

Before Judges ANTELL, J.H. COLEMAN and SIMPSON.

The opinion of the court was delivered by

SIMPSON, J.A.D.

Defendant appeals his conviction and jail sentence for the disorderly persons offense of lewdness (*N.J.S.A.* 2C:14-4). The complaint charged him with exposing his genitals on May 1, 1983 in Florham Park before two 13 year old nonconsenting females for the purpose of arousing or gratifying sexual desire. ***184** A person convicted of a disorderly persons offense may be sentenced to imprisonment for a definite term not exceeding 6 months, pursuant to *N.J.S.A.* 2C:43-8. Without counsel and without being advised of the incarceration exposure, defendant pleaded not guilty on July 11, 1983 in Florham Park Municipal Court. At the trial on September 19, 1983 he represented himself, was found guilty, and was sentenced to 60 days in the county jail. A September 30, 1983 order of the Assignment Judge found defendant to be indigent and provided assigned counsel for his appeal to the Superior Court. At the December 2, 1983 trial *de novo* on the record, he was again found guilty and sentenced to 60 days in jail. A subsequent motion for a new trial was denied, but on July 19, 1984 defendant was resentenced to 30 days in jail with credit for 4 days served before he was released on bail pending appeal.

[1][2] No detailed review of the evidence or facts is required and we do not reach several issues arising from alleged error below, since we believe that the judgment of conviction must be reversed and the jail sentence vacated. Our careful review of the record satisfies us that defendant did not knowingly and intelligently waive his Sixth Amendment right to counsel at the trial before the municipal court. *Argersinger v. Hamlin,* 407 *U.S.* 25, 92 *S.Ct.* 2006, 32 *L.Ed.*2d 530 (1972); *Rodriguez v. Rosenblatt,* 58 *N.J.* 281, 277 *A.*2d 216 (1971). The importance of the effective assistance of counsel, guaranteed as well by Article 1, paragraph 10 of the New Jersey Constitution, has been aptly stated by Justice

Pashman for our New Jersey Supreme Court in *State v. Sugar,* 84 *N.J.* 1, 15-17, 417 *A.*2d 474 (1980), and the required ****1079** strong evidence of, and presumption against, waiver were noted in *State v. Fusco,* 93 *N.J.* 578, 591, 461 *A.*2d 1169 (1983). A searching and painstaking inquiry must be made by a trial judge before he can conclude there has been an intelligent and competent waiver of counsel. *United States v. Welty,* 674 *F.*2d 185 (3 Cir.1982).

***185** [3][4][5][6] Before a judge may accept a guilty plea, *R.* 3:9-2 and *R.* 7:4-2(b) require that a defendant understand "the consequences of the plea." No less should be required before a waiver of counsel is determined and a trial proceeds when a *pro se* defendant may be jailed following conviction. The "range of allowable punishments" under a charge to which an accused pleads guilty must be explained to a defendant by a judge. *Von Moltke v. Gillies,* 332 *U.S.* 708, 724, 68 *S.Ct.* 316, 323, 92 *L.Ed.* 309, 321 (1948) (plurality opinion). We hold that prior to or at the trial of any criminal case where a jail sentence may follow a conviction, the judge must first advise a *pro se* defendant of such incarceration exposure before determining there has been an effective waiver of counsel. [FN1] Since the defendant in this case was not so advised, the conviction cannot stand.

> FN1. We add, of course, that provision of counsel on the appeal of the municipal court conviction to the Superior Court does not cure the deficiency, since the second trial was *de novo on the record* --which precluded effective assistance of counsel at the prior critical stage of the proceedings. *State v. Sugar, supra,* 84 *N.J.* at 16, 417 *A.*2d 474.

Reversed and remanded for a new trial.

J.H. COLEMAN, J.A.D., concurring.

I fully concur with my colleagues to reverse the uncounseled conviction which required 30 days of incarceration of defendant who did not waive his right to counsel. I write separately because I fear that the majority opinion will be construed as extending the requirement of counsel in nonindictable offenses beyond the rule of law established in *Argersinger v. Hamlin,* 407 *U.S.* 25, 92 *S.Ct.* 2006, 32 *L.Ed.*2d 530 (1972), *Rodriguez v. Rosenblatt,* 58 *N.J.* 281, 295, 277 *A.*2d 216 (1971) and *R.* 3:27-2. Hence, I would reverse the conviction based on the existing law.